No. 788.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

SAMUEL BROS. & COMPANY (a corporation),
Appellant,

vs.

THE HOSTETTER COMPANY (a corporation),
Appellee.

APPELLANT'S BRIEF.

R. H. COUNTRYMAN,
Solicitor for Appellant.

Pernau Bros. Print, 543 Clay St., S. F.

Rundy Circuit
Court of Appeal
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APPELLANT'S BRIEF.

Statement of the Case.

Appellee claims to be the owner of a certain liquid preparation, which it designates and calls a medicinal preparation, and which it advertises to cure dyspepsia, indigestion, constipation, biliousness, nervousness, liver andkidney trouble, sleeplessness, fever and ague, malaria, rheumatism, chronic diarrhœa, diseases of the urinary organs, and any and all kinds of kidney and stomachic troubles. It advertises that it is most excellent for women, and cures her of all the disorders to which she

is functionably liable. It recommends and prescribes the consumption of its bitters by the wine-glassfull at least three times daily before meals. In its almanac for California and Oregon for the year 1901, under the heading in bold type, "Important to our patrons", it advertises, "The public should also beware of the local " bitters attractively labelled and sold as 'appetizers' " and 'stomachics'. The injury inflicted upon the " stomach by these drams in disguise is irreparable. " They are composed of cheap and fiery spirits, with " some bitter extract infused for flavoring, and in con- " sequence of the low price at which they are sold, " enjoy the patronage of impecunious imbibers."

Appellee claims to have acquired the title to these bitters by purchase from the administrator of the Estate of David Hostetter, deceased, on May 1st, 1889, and that it has the right and title to the exclusive use of the words " Hostetter's Celebrated Stomach Bitters", Hostetter's Bitters", "Hostetter Bitters", "Hostetter", "Host", and "H. Bitters". It claims to be a corporation organized under the laws of the State of Pennsylvania on May 1st, 1889. On July 15th, 1899, it filed its bill of complaint against appellant, in which it set up its corporate capacity, and its purchase of the exclusive right to make and sell said compound. That said stomach bitters were sold in bottles only to which were attached labels, which labels were duly registered as trade-marks. No attempt was made to prove any registered trade-mark, appellee

relying entirely on unfair competition.

It then charges against appellant (p. 8), "Upon appli- " cation for Hostetter's Bitters by an intending pur- " chaser, he is sold and delivered by defendant, stomach " bitters as aforesaid in bulk at $2.25 a gallon, the " same so near in resemblance to your orator's bitters " as to mislead and deceive the ordinary purchaser, and " at the same time he is advised, and it is suggested to " him by defendant company that in order to make the " most money by a resale of said bulk bitters, he first " purchase a case (one dozen bottles) of your orator's " bitters, and whenever a bottle becomes empty, by sale, " by the dose or drink, to then refill said bottle with " the said bulk bitters, which he assures the purchaser " are the genuine bitters made and sold by your orator, " and stating that your orator sells the same in bulk " 'to importers only'; and defendant company also " furnishes and delivers to such customer the " said empty bottle, having thereon the labels " and trade-marks of your orator, for the avowed " purpose, coupled with the advice of defend- " ant company, to be refilled with its spurious or " bogus bitters, and then sold to consumers as and for " your orator's bitters."

The appellant denied the corporate existence of appellee, denied its purchase from the administrator of David Hostetter, deceased, or any other person, of the exclusive or any right to make or sell said compound, and denied that complainant had such exclusive right or the

exclusive right to any of said names or any abbreviation thereof.

It further plead as follows (page 22): "Defendant " admits that it has sold, and is now selling, and in- " tends to continue to sell, at its place of business, an " article of stomach bitters slightly resembling the " stomach bitters made by complainant in color, taste " and smell, but this defendant says that it has only " sold a very small quantity of said bitters, has never " attempted to push or urge the same in connection " with its business, and that such bitters as it has sold " has only been incidental to its main business of the " sale of wines and liquors of which it may have the " agency, or be the proprietor, and that such bit- " ters as it has sold, of any kind or character, " are very limited in quantity and amount and value, " and this defendant denies that any of said articles of " stomach bitters have been sold, or are now being sold " with any desire to reap the benefit from the trade cre- " ated and enjoyed by complainant in the stomach bitters " prepared and sold by it; and denies that any of said ar- " ticles of stomach bitters so sold by it are sold as in the " manner set forth in the sixth paragraph of said com- " plaint, or in any manner which is unlawful or a fraud " upon complainant; and denies that when an application " for Hostetter's Bitters is made to defendant by an in- " tending purchaser, such customer is sold and delivered, " or sold or delivered by defendant stomach bitters so " nearly in resemblance to complainant's bitters as to

" mislead and deceive, or mislead or deceive the ordin-
" ary or any purchaser; and denies that at the same
" time such purchaser or customer is advised, or it is
" suggested to him by defendant, that in order to make
" the most money by refilling of said bottles, he first
" purchase a case consisting of one dozen bottles or any
" number of bottles of complainant's bitters, and when-
" ever a bottle becomes empty by sale by the dose and
" drink, or dose or drink of complainant's bitters, to
" then refill said bottle with the bitters which said cus-
" tomer has purchased from defendant; and denies that
" defendant ever assures any customer that the bitters
" so sold by it are the bitters made and sold, or made
" or sold, by complainant; and denies that it states to
" such customer that complainant sells said bitters in
" bulk to importers only; and denies that it furnishes
" and delivers, or furnishes or delivers, to such custom-
" ers an empty bottle having thereon the labels and
" trade marks, or labels or trade marks, of complainant,
" for the avowed or any purpose, coupled with the ad-
" vice of defendant company to refill said bottle with
" the bitters sold to said customers; and denies that
" said bitters sold by this defendant are spurious or
" bogus bitters, but that on the contrary the same are
" superior in quality and beneficial effect to the bitters
" manufactured and sold by complainant."

Appellant further alleges that the words, the exclusive use to which are claimed by appellee, are simply descriptive words, or qualifying adjectives indicative of a

special product used to designate a compound of bitters made according to a formula known to pharmacists and chemists, and that said bitters have for many years last past been sold by many persons rightfully and lawfully in the open market.

Appellant further alleges as follows (page 25): "And " further answering said bill of complaint, defendant " alleges that whenever an intending purchaser of bit- " ters made and compounded by complainant, or when " any person calls at defendant's place of business and " demands to be sold and delivered, or sold or delivered " the bitters made and compounded by complainant, " giving the name 'Hostetter's Stomach Bitters', or " 'Hostetter's Bitters', defendant sells and delivers to " him upon such demand the stomach bitters com- " pounded, bottled and sold by complainant in original " packages, and that defendant does not sell and never " has sold to any person, upon a call for 'Hostetter's " Stomach Bitters' or 'Hostetter's Bitters', any bitters " except those compounded in original packages, and " that if, under any circumstances, any other bitters " have been sold in bulk or otherwise by any of the " clerks, agents or employees of defendant as and for " the bitters compounded for complainant, or if any of " said clerks, agents or employees have refilled any " bottles which once contained the bitters compounded " by complainant, such acts are isolated cases, unknown " to defendant, and wholly without its countenance, " sanction or authority."

Appellant's answer was filed on September 30th, 1899.

To sustain the allegations of the bill of complaint, appellee on October 2nd, 1899 (pp. 63, 64), served on appellant's solicitor, in San Francisco, a notice that on Friday, the 13th day of October, 1899, at 10 o'clock A. M., in the City of Pittsburg, Pennsylvania, it would proceed to take the testimony of D. Herbert Hostetter, R. S. Robb, John S. McCullough and John B. Crooks, in shorthand to be thereafter transcribed, etc. (page 62).

Pursuant to said notice the depositions of R. S. Robb, John B. Crooks, John S. McCullough and F. P. Carson were taken on October 9th 1899, in said Pittsburg, in the absence of any person representing appellant (pages 30 and 31).

On October 27th, 1899, appellee served on appellant's solicitor, in San Francisco, a notice that on Thursday, December 7th, 1899, in said Pittsburg, it would proceed to take the depositions of R. S. Robb, John S. McCullough, John B. Crooks and F. P. Carson (pages 93, 94 and 95).

Under said notice, in the absence of appellant, or its solicitor, said depositions are purported to have been taken on December 18th, 1899 (page 65).

These depositions are the subject of criticism for a number of reasons. Under the first notice the deposition of Mr. Hostetter was not taken, while the deposition of Mr. Carson, who was not named in the notice,

was taken. The depositions were not taken pursuant to the notices. The first one was taken prior to the time fixed in the notice, the second subsequent to said time, and the taking of the same was continued without the consent of appellant.

It is evident from the depositions themselves that the witnesses did not appear and give their testimony, and that the certificates of the notary public that the witnesses appeared before him is not true.

The depositions show on their face that they are simply copies. This fact clearly appears from a consideration of the depositions themselves. In the depoposition taken October 9th, 1899, consider the deposition of R. S. Robb. Certain questions were asked this witness and his deposition was completed. (See pages 31 to 40.) He was recalled on October 11th, 1899, and gave further testimony (pp. 48–52). In the deposition taken December 18th, 1899, the testimony of Mr. Robb appears *mutatis mutandis* as in the deposition of October 9th, 1899, the same questions are asked, the same stops and breaks are made in the questions, the same answers are given, the same stops and breaks are made in the answers. For illustration, take the questions and answers on pages 49 to 52:

" Q. Without setting it forth to any extent, will you " give us something of the substance of it—the names " and the dates—in support of the statement in the bill?

" A. Yes, sir. The following is the substance of

" the article of agreement between the Hostetter Com-
" pany and the administrator of the estate of David
" Hostetter—

" Q. (Interrupting.) That was subsequent to the
" incorporation of the Hostetter Company in the State
" of Pennsylvania, was it?

" A. It was on the same day.

" Q. On the same day as the incorporation?

" A. Yes, sir. (Continuing.) The original agree-
" ment reads as follows:

" 'Article of Agreement, made this first day of May,
" '1889, between D. Herbert Hostetter, administrator of
" 'all and singular the goods and chattels, etc., of D.
" 'Hostetter, late of the City of Alleghany, in the
" 'County of Alleghany, and State of Pennsylvania, de-
" 'ceased, party of the first part, and the Hostetter
" 'Company, a corporation of the State of Pennsylvania,
" 'party of the second part.'

" Q. Just give us the substance of it. What was
" conveyed for value, who is it executed by, and the
" date.

" A. The party of the first part agrees to sell, as-
" sign and transfer to the party of the second part, and
" its successors and assigns, all the goods, chattels and
" property, of whatever kind or nature, including the trade
" marks, recipes, formula and goodwill, which belonged
" to or were owned by the late firm of Hostetter &
" Company. This includes the formula, recipes and
" trade-marks, for the manufacture, identification and

" sale of Dr. J. Hostetter's Celebrated Stomach Bitters.

" Q. Just state how the present company got title " to the property.

"A. Hostetter & Company was composed of Dr. David " Hostetter and one M. L. Myers, who had no monetary " interest in the business.

" Q. Then Myers was a nominal partner.

"A. Yes; he was merely a nominal partner.

" Q. And he aquiesced in this conveyance.

"A. Yes; he acquiesced in this conveyance.

" Q. All right, go ahead. The date of that was " what?

"A. The first day of May, 1889.

" Q. Who was it executed by?

"A. This agreement is signed by D. Herbert Hos- " tetter, administrator, party of the first part, and " The Hostetter Company, party of the second part, by " D. Herbert Hostetter, president.

" Q. Who is it witnessed by?

"A. It is attested by the seal of the company, and " the signature of the secretary, M. L. Myers.

" Q. That is the same Myers who was the nominal " partner?

"A. Yes; the same gentleman who was the nominal " partner in the firm of Hostetter & Company.

" Q. Are you familiar with the handwriting of these " gentlemen?

"A. I am.

" Q. And you know them to be their signatures?

"A. I know these signatures to be all genuine, as " well as the seal of the company—of The Hostetter " Company—which is hereto attached.

" Q. What did the company acquire by this—any " real estate, leases, or anything of that sort.

"A. They acquired no real estate; they acquired all " of the goods, merchandise, machinery and stock, for " manufacturing purposes, in all its forms and condi- " tions.

" Q. That is, for manufacturing bitters?

"A. Yes; for manufacturing bitters, and also for " printing almanacs, including presses, paper, type and " materials of all kinds; boxes, packing, bottles, caps " and all machinery and appliances for carrying on the " business, boiler, engine and the plant generally, " which includes pulleys and shafting together with the " formula, recipes, goodwill, trademarks, and all other " properties that theretofore had been the property of " Hostetter & Company and Hostetter & Smith.

" Q. And I suppose the complainant—The Hostet- " ter Company—still owns and holds this property that " it purchased at that time.

"A. Yes, sir; so much of it as is not perishable, as " paper, ink—wear and tear.

" Q. The leases were also turned over to the present " company, were they—the leases of the manufacturing " buildings?

"A. Yes, sir."

By inspection of pages 76, 77, 78 and 79 it will be

found that there is not so much as a change of a punctuation mark from the above quotation, although it is claimed that these depositions were taken one on the 9th day of October, 1899, and the other on the 18th day of December, 1899.

At the time of the trial of this cause before the Circuit Court a number of other causes in which the Hostetter Company was the complainant, were presented to that Court. The bills of complaint were similar, and the arguments were made at one successive session of the Court. The depositions taken in Pittsburg in the other causes are exact duplicates of the depositions taken in the cause at bar. In fact, even the same typographical errors appear in some of them, showing that they were merely carbon copies.

Appellant objected to these depositions for the reason stated and other reasons, and renews its objections to them before this Court.

For the purpose of obtaining testimony appellee hired two spies, W. R. Morrison and J. W. McEvers. Morrison was the leader. At the time he gave his testimony, on December 28th, 1899, he was twenty-four years of age. He had been in the Army about seven months, had been employed at one time by a lumber company, but had no regular business (p. 139), McEvers was thirty-eight years of age, claimed to be a druggist, but he never had any degree and knew but little of chemistry (pp. 207, 211). He was put forward as an expert by appellee, but he did not even know that

appellee's bitters contained alcohol (p. 188).

The only proof of any wrong-doing that has been produced or could be produced against appellant is that of these two witnesses, who were hired for the purpose of obtaining testimony. Their testimony was more than met by the testimony of defendant's witnesses, and we think the distinguished Circuit Judge overlooked the testimony of defendant's witnesses, and the very flimsy character of the testimony produced by appellee as to any wrong-doing by appellant from the fact that a number of similar cases were argued and submitted at the same time.

Appellant maintains that it in no way violated any property right or any trademark right of appellee, and that it is not guilty of any of the acts charged against it in the bill of complaint, and for that reason, disregarding all of the other defenses, the decree should have been rendered in its favor.

Appellant pleaded a special defense to the appellee's bill of complaint, setting forth that appellee was guilty of a fraud on the public in palming off on the public an alcoholic stimulant as a medicinal article, and a large amount of testimony was taken in connection with this defense. The effect of alcohol on the human system was considered by experts. Appellant obtained its expert testimony in San Francisco. All of the expert testimony of appellee came from the East. Appellant contends that appellee should have at least shown that it was impossible to obtain expert testimony

in California, and that under the circumstances, appellee's expert testimony should be received with great caution. The testimony discloses that appellant is a mercantile house in San Francisco, of high standing, doing a large business. Mr. Levy testified that he did not feel like disclosing the amount of appellant's business, but that it was considerably in excess of one hundred thousand dollars a year. That the entire amount of bitters sold by the house did not exceed the sum of $70 a year invoice price (pp. 223, 224, 225 and 226). That the house was largely engaged in the whisky business. That it carried Hostetter's Bitters in bottles, but that its sale of bitters of all kinds and character was very small (p. 226).

The decree was filed and entered August 30th, 1901, in effect, holding that appellant for the purpose of disposing of seventy dollars worth of bitters a year, in a business running up into hundreds of thousands of dollars, had engaged in a deliberate fraud, the only basis of which was the testimony of two men who were hired and paid for the purpose of obtaining testimony.

Specifications of Error.

The Honorable Circuit Court erred

I.

In ordering and granting an injunction against the appellant.

II.

In entering the interlocutory decree in favor of the appellee herein for an injunction.

III.

In holding the equities of this case in favor of the appellee and against appellant.

IV.

In holding that the use of the names "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them by appellant upon any liquid bitters or medicinal liquid, being an extract of bitter roots or herbs in a solution of alcohol, is unfair competition by appellant with appellee's business.

V.

In granting an injunction so far as it relates to the words or names of "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them to be used in connection with the manufacture or sale of a liquid or medicinal compound or preparation.

VI.

In granting an injunction so far as it relates to the making or using or selling any liquid or laxative medicine or medicinal preparation, under or marked with the several names or words of "Hostetter's

Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them.

VII.

In holding that the appellee is entitled to a trade-mark or trade name in the words or names "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them as applied to a liquid or laxative or medicinal compound or preparation

VIII.

In holding that the appellee had or now has or ever had the exclusive ownership of or the exclusive right to make or compound or sell a liquid or laxative or medicinal compound or preparation under the several names of "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them.

IX.

In holding that no firm or person or corporation other than appellee has the right to make or sell or deal in any article of stomach bitters under the names of "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them, when said bitters are not made or compounded by appellee.

X.

In holding that appellee has the exclusive right to

the name "Hostetter" or any abbreviation, alteration or amplification thereof, as used in connection with the compounding or sale of stomach bitters.

XI.

In holding that appellant has not the right to use the name "Hostetter" or "Hostetter's Celebrated Stomach Bitters", or "Hostetter Bitters", or "H. Bitters", in connection with the manufacture or compounding or sale of stomach bitters.

XII.

In holding that appellant refilled bottles resembling appellee's bottles, or suggested to intending purchasers or others any use of empty bottles once used by appellee for the purpose of selling to customers or others any article of stomach bitters not compounded or manufactured or sold by appellee.

XIII.

In not holding that the ordinary purchaser of appellee's article, believes when he is purchasing appellee's article that he is buying a medicinal preparation, whereas in fact he is purchasing an alcoholic stimulant.

XIV.

In not holding that the stomach bitters made and sold by appellee is an alcoholic stimulant, mixed with certain sweetening extracts and articles for the purpose of making the same palatable, and is not a medicinal preparation.

XV.

In not holding that the ordinary purchaser would be deceived to his harm by the statements on appellee's advertisements and packages.

XVI.

In not holding that there were material misrepresentations and false representations in and on appellee's labels, bottles, packages and advertising matter.

XVII.

In not holding that appellee's preparation of stomach bitters is a fraud upon the public tending to deceive the ordinary purchaser, and containing injurious and deleterious articles and beverages tending to the injury of, and to deceive the public, and the ordinary purchaser.

XVIII.

In not holding that appellee's business is fraudulent; that it falsely advertises and sells its preparation of stomach bitters as a medicinal compound or preparation, and that it intentionally, deliberately and purposely deceives the public and intending purchasers by its labels, bottles, packages, and advertising matter.

XIX.

In holding that the words or names "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", are words or names known to the drug trade or other trade or to the

medical profession, and to the public as being the exclusive preparation of appellee.

XX.

In holding that appellant has been guilty of fraud and deceit in using the words "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them in connection with liquid compounds, bitters, or preparations sold by it, not purchased from or manufactured by appellee.

XXI.

In holding that appellee offered any proof, or sufficient legal evidence to prove that it is a corporation.

XXII.

In permitting the depositions of the witness Robb, Crooks, McCullough and Carson, or any of them, to be introduced in evidence, and in not suppressing said depositions, and all of them, because timely notice of the taking of said depositions had not been given and because insufficient time had been allowed for appellant's counsel and solicitor to reach the place of the taking of said depositions and because the taking of said depositions was had before the time for which the same were noticed, and because the taking of the same was adjourned without the consent of appellant, and adjourned for more than one day, and not adjourned from day to day, and because it appeared that the taking of said depositions was unfair, and because it affirmatively

appeared upon the face of said depositions and of the depositions filed in the case of *The Hostetter Company* vs. *Martinoni*, and the other cases with which this cause was argued and heard before the above named Circuit Court that said depositions were carbon copies, and that the witnesses therein had not testified in the several different causes, and that it was not shown in which of said causes, if any, said witnesses had so testified, and that the same typographical mistakes appeared in each of said depositions, and in the depositions purporting to be taken under subsequent commissions, and that the taking of all of said depositions was noticed on the same day and hour of the day, all of which objections were made and urged before the Circuit Court on the hearing and argument and by said Circuit Court heard and considered and denied and decided against appellant.

XVIII.

In not striking out the testimony of the witness Robb relating to the bill of sale to the Hostetter Company on the ground that the same was not the best evidence, and that the bill of sale had been made by D. Herbert Hostetter, as the administrator of the estate of Hostetter, deceased, with himself, as vice-president of the Hostetter Company, and that no order of Court was shown authorizing the making of said bill of sale, or confirming the same, and that the testimony as to the value of the goodwill of appellee was based on its connection with the use of a secret formula, the knowl-

edge of which formula was not possessed by the witness giving his testimony, and that said secret formula was not divulged, and the best evidence was not introduced, and that only hearsay evidence was introduced in connection with the value of said goodwill, and with said bill of sale, and there was no proof of the value to appellee in the sale or manufacture of its bitters, article or preparation of none but fair competition, but all of said proof was based on the theory of a registered trade mark or trade name, and that the testimony showing that the stomach bitters of appellee were known indiscriminately to appellee as "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", was hearsay and incompetent and irrelevant testimony, and the testimony as to the registration of appellee's labels was incompetent, irrelevant and immaterial, as this was a case of unfair competition, and not one based on a trade mark, and that the evidence as to the bill of sale to appellee did not show the loss of the original, but did show that the original was in the possession of appellee, and that exhibits "A", "B", "C", and "D" to the depositions of said witnesses Robb, Crooks, McCullough and Carson could not bind appellant, and were not made or noticed as a part of the deposition of any of said witnesses, and that exhibit "D" was a consent decree, and offered after the adjournment and completion of the taking of the depositions of said witnesses, and that all of said testimony was incompetent, irrel-

evant and immaterial, all of which said objections were taken and made before said Circuit Court, and by said Circuit Court considered and decided, and denied against appellant.

XXIV.

In holding that appellee has a proprietary interest in, or an exclusive right to, the formula of "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any abbreviation, alteration, or amplification thereof, when said formula was not disclosed to the Court.

XXV.

In not holding that appellee is guilty of fraud in putting and placing upon the market as a medicinal preparation of value, a compound of stomach bitters, when in fact, the stomach bitters manufactured by it are of no value whatever, save as an intoxicating beverage and stimulant.

XXVI.

In not holding that appellee has been guilty of such moral wrong and obliquity as to deprive it of the protection of a court of equity.

XXVII.

In permitting a *dedimus potestatum* to issue to take the depositions of certain expert witnesses, without any showing that expert testimony could not have been obtained within the State of California, and in not sup-

pressing said depositions, all of which objections were made to and considered by said Circuit Court, and decided against appellant.

POINTS AND AUTHORITIES.

I.

Not having waived verification of answer, appellee was compelled to establish its case by two witnesses.

3 Desty's Fed. Procedure, 9th Ed. p. 1757 and cases cited.

II.

The testimony of appellee's agents should be received with great caution.

Hostetter Co. vs. *Bower*, 74 Fed. 235;

Gorham Mfg. Co. vs. *Emery-Bird-Thayer Mfg. Co.*, 92 Fed. 774; s. c. 104 Fed. 243.

III.

Where one procures a tort to be committed he cannot take advantage of it.

Gorham Mfg. Co. vs. *Emery-Bird-Thayer Mfg. Co., supra;*

Leibig Extract Meat Co. vs. *Libby, McN. Co.*, 103 Fed. 87;

State vs. *Hull*, 54 Pac. Rep. (Or.) 159;

Miller vs. *Donovan*, 39 N. Y. S. 820;

Howland vs. *Blake Mfg. Co.*, 31 N. E. (Mass.) 656;

See also *10 Harvard Law Review*, 181.

IV.

Appellee has no exclusive right to make Hostetter's Bitters, or to call them by that name.

Hostetter vs. *Adams*, 10 Fed. 838;

Hostetter vs. *Fries*, 17 Fed. 620;

Hostetter Co. vs. *Van Vorst*, 62 Fed. 600;
Singer Mfg. Co. vs. *Riley*, 11 Fed. 706;
Singer Mfg. Co. vs. *Larson*, Fed. Cas. 12,902;
Centaur Co. vs. *Heinsfurter*, 84 Fed. 955;
Centaur Co. vs. *Marshall*, 97 Fed. 785;
Watkins vs. *London*, 54 N. W. (Minn.) 193.

V.

As appellant is not connected with the sale made by its clerk there cannot be any recovery.

Gorham Mfg. Co. vs. *Emery-Bird-Thayer Mfg. Co.*, 92 Fed. 774;
s. c. on Appeal, 104 Fed. 243.

VI.

A symbol or label claimed as a trademark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained.

Holzapfel's Comp. Co. vs. *Rahtjen's American Comp. Co.*, U. S. Supreme Court, decided October 21st, 1901. Supreme Court Reporter, Vol. 22, p. 6;
Manhattan Medicine Co. vs. *Wood*, 108 U. S. 218;
Hilson vs. *Foster*, 80 Fed. 896;
American Cereal Co. vs. *Pettijohn Cereal Co.*, 72 Fed. 903;
Coleman vs. *Dannenberg Co.*, 30 S. E. (Ga.) 639;
Chapman vs. *State*, 27 S. E. (Ga.) 789;
Mitchell vs. *Commonwealth*, 51 S. W. (Ky.) 17;
Krauss vs. *Peebles*, 58 Fed. 585.

VII.

Appellee should have produced formula, which is the best evidence. Having produced inferior evidence, it must be presumed that the best evidence would have been adverse.

Hostetter Co. vs. *Comerford*, 97 Fed. 585, 586;
Cal. C. C. P., 1963 sub. 5;
Laird vs. *Wilder*, 9 Bush (Ky.) 131, 134–136;
s. c. 15 Am. Rep. 707, 710, 711.

VIII.

Any alleged medicine prepared by secret formula is quack medicine, and beneath the dignity of any Court to protect.

Fowle vs. *Spear*, Fed. Cas. 4996;
s. c. Cox, Trademark cases, 67.
Heath vs. *Wright*, Fed. Cases 6310;
s. c. Cox, Trademark cases 154;
Smith vs. *Woodruff*, 48 Barb. 438, 440;
Wolfe vs. *Burke*, 56 N. Y. 115, 122, 123;
Kohler Mfg. Co. vs. *Beeshore*, 59 Fed. 572;
Siegert vs. *Abbott*, 25 N. Y. S. 590, 597;
26 Am. & Eng. Enc. Law (1st Ed.), pp. 456, 458;
Hopkins on Unfair Trade, Sec. 27.

IX.

Appellee's bitters advertised as a medicine are merely an alcoholic stimulant, are contra-indicated in the diseases for which they are prescribed, and are a fraud on the public.

Alcohol is a food, but only very rarely a desirable food.

Hemmeter on Diseases of the Stomach, pp. 288–291.

Good discussion of the value of alcohol.

Thompson on Practical Dietetics, pages 206, 207.

Instances where alcohol is contra indicated.
Collated from Loomis on Practical Medicine:

ACTIVE HYPERAEMIA OF LIVER.

Defined, page 369.

Etiology, page 370.

Alcohol must be abjured, page 371.

PASSIVE HYPERAEMIA OF THE LIVER.

Defined, page 371.

No Carbo-hydrates (includes alcohol) pages 373–374.

CIRRHOSIS OF THE LIVER.

Defined, page 374.

Etiology, page 376.

ABSCESS OF LIVER.

Stimulants may be given, page 389.

Dr. Golding, appellee's witness, prescribed Hostetter's Bitters for this.

PERIHEPATITIS.

Defined, page 394.

Abstinence from all forms of alcoholic stimulants, page 396.

VII.

Appellee should have produced formula, which is the best evidence. Having produced inferior evidence, it must be presumed that the best evidence would have been adverse.

Hostetter Co. vs. *Comerford*, 97 Fed. 585, 586;
Cal. C. C. P., 1963 sub. 5;
Laird vs. *Wilder*, 9 Bush (Ky.) 131, 134–136;
s. c. 15 Am. Rep. 707, 710, 711.

VIII.

Any alleged medicine prepared by secret formula is quack medicine, and beneath the dignity of any Court to protect.

Fowle vs. *Spear*, Fed. Cas. 4996;
s. c. Cox, Trademark cases, 67.
Heath vs. *Wright*, Fed. Cases 6310;
s. c. Cox, Trademark cases 154;
Smith vs. *Woodruff*, 48 Barb. 438, 440;
Wolfe vs. *Burke*, 56 N. Y. 115, 122, 123;
Kohler Mfg. Co. vs. *Beeshore*, 59 Fed. 572;
Siegert vs. *Abbott*, 25 N. Y. S. 590, 597;
26 Am. & Eng. Enc. Law (1st Ed.), pp. 456, 458;
Hopkins on Unfair Trade, Sec. 27.

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CATARRH OF THE BILE DUCTS.

No Carbo-hydrates permitted, page 431.

GALL-STONES.

Wines prohibited, page 440.

AMYLOID DEGENERATION OF KIDNEYS.

Defined, page 617.

Incurable, page 621.

Dr. Golding, appellee's witness, prescribed Hostetter's Bitters for this.

CYSTITIS OF KIDNEY.

Defined, page 643.

"No form of alcohol should be allowed", page 645.

RHEUMATISM.

Alcoholic stimulants contra indicated, page 899.

Diet must be non-stimulating, page 903.

GOUT.

Alcohol should be avoided, page 913.

DIABETES.

Alcohol in any form is harmful, page 921.

In chronic alcoholismus there is chronic gastritis, congestion, cirrhosis of the liver, fatty degeneration and dilatation of the heart, Bright's disease of the kidneys, page 954.

Collations from Hemmeter on Diseases of the Stomach:

CHRONIC GASTRITIS.

Alcohol should be avoided, page 468.

Nervous Dyspepsia.

If caused by abuse of alcohol, alcohol should be abandoned, page 872.

On the whole should be avoided, page 875.

Collations from Thompson on Practical Dietetics:

Alcohol as a Diuretic, page 211.

Action on Mucous Membranes, page 211.

Action on Gastric Digestion, more than ½ oz. in stomach retards digestion, page 211.

Flavored alcoholic beverages are seductive, and sometimes beget the habit of Alcoholism, page 232.

Cites Angostura Bitters, which are in the same category as Hostetter's.

Diabetes.

Patients do better without alcohol, page 658.

Liver Diseases in General.

"Alcohol had better be prohibited entirely", page 558.

Nephrites. (Inflammation of Kidneys.)

All sorts of liquors are absolutely prohibited, page 466.

Albuminuria.

All forms of alcoholic drinks forbidden, page 470.

Chronic Bright's Disease.

"Patients had better leave alcohol alone. * * * Occasional spree may do the patient less harm

than continued drinking in small quantity" page 475.

ALCOHOLIC DYSPEPSIA.

Only cured by entire cessation of drinking, page 498.

Collations from Herman on Diseases of Women, page 100:

CHRONIC METRITIS (Inflammation of Uterus), page 100.

Alcohol must be forbidden.

Effect on pelvic organs is to aggravate congestion.

Carpenter on Mesmerism and Hypnotism, pages 45-47:

Psychological effect of patent medicines.

In the New York Public Opinion, issue of March 28th, 1901, there will be found an article reading as follows:

"ALCOHOLISM.

"A discussion of this subject took place at the last meeting of the New York Academy of Medicine, as reported in the Medical Record. The president, Charles L. Dana, M. D., introduced the discussion with some general remarks in the course of which he said that as a rule the drunkard did not live more than fifteen years, and it was seldom that the human organism could survive more than 3,000 intoxications.

"BEER-DRINKING AND KIDNEY DISEASE.

"Dr. Hermann M. Biggs spoke upon this aspect of the question. He said that the majority of alcoholic patients at Bellevue gave a history of taking from one to three drinks of whisky, and from four to five pints of beer a day. In the last twenty-five years lager beer had largely replaced the weiss beer

formerly used in Germany, and during this period the death rate from disease of the kidneys had greatly increased. These facts appeared to find their explanation in the change in the type of drinking, *i. e.*, this combination of spirituous and malt liquors.

"EFFECT OF ALCOHOL ON THE NERVE CENTERS.

Dr. Allen Starr said that in the majority of individuals sherry produced a quarrelsome mood, while, on the other hand, port tended to exert a soothing effect. Champagne produced apparently a decided exhilaration of the flow of thought, while Burgundy made one think more slowly, and by no means added to the feeling of conviviality. Whisky, brandy, and gin had very different effects on the individual; hence, we should remember that we were not dealing with the effects of alcohol per se, but with its effects in certain combinations. There was no known disease of the spinal cord produced by alcoholism, although we knew of distinct effects upon the nerves and upon the brain as a result of alcoholism. The alcohol seemed to affect the parts of the brain which were the most highly organized and developed. The highest centers were the ones first attacked; the intermediate centers and the lower centers of the brain and the spinal cord, did not seem to be specially susceptible to alcohol. The pathology of alcoholic insanity was today most clear and distinct. Berkeley had shown that the alcohol acted upon the brain by dissolving, as it were, the dendrites, and so rendering the cells incapable of receiving impulses from other cells; hence, the lack of co-ordination and loss of memory, so evident in all conditions of chronic alcoholic insanity.

"ALCOHOLISM AND TUBERCULOSIS.

"Dr. S. A. Knopf said that alcoholism was a pronounced factor in tuberculosis. Statistics showed

that twenty-five per cent of children committed to sanatoria for the treatment of scrofulous and tuberculous diseases had alcoholic parents. It should be remembered that there was a very prevalent opinion among the laity, and to a certain extent among physicians, that alcohol was a most important agent in the treatment of consumption. If alcohol were given in quantities sufficient to control the temperature, it would convert phthisical patient into an alcoholic. As to the treatment of inebriates, the speaker said that he approved of moral suasion, arguments and hypnotic suggestion. Poor tenements and poor cooking were potent factors in the production of alcoholism.

"CARE AND TREATMENT.

"The hypodermic use of strychnine and atropine was now generally agreed to be the chief measure of usefulness, together with proper attention to the nutrition in cases of acute alcoholism. Dr. Starr did not think it was very common to find a recovery from chronic alcoholism of the type of periodical drinking in which there was an entire cessation of the drinking between the attacks. This form, he believed, was more a matter of moral obliquity than of true insanity. The diagnosis of insanity could not he made from a single symptom; there must be something more than a mere tendency to drinking on which to base the diagnosis.

"Dr. Peabody said that he had been told by a physician that in the so-called 'gold cures' it was the practice to give daily hypodermic injections of strychnine and atropine, the solution being of a golden color, but not containing any gold. After the treatment had been carried out along this line for a certain length of time, the patient was told that he could, if he so desired, go to the sideboard and help himself to liquor in the presence of the physician. Some would accept this invitation.

They would then receive what was apparently the customary hypodermic injection, but it was not really so, the physician having smuggled in a dose of apomorphine. Of course, when shortly afterward the patient vomited the liquor, he would be profoundly impressed, and disposed to believe the statement made to him that after having gone through the 'cure' it would be impossible for him to 'digest and retain' liquor, even if he saw fit to take it.

"IGNORANCE AND ALCOHOLISM.

"Dr. G. L. Peabody said that a speaker had sounded the true note when he had called attention to ignorance of the effects of alcohol as a cause of alcoholism. People were disposed to think that there was no particular harm in drinking spirits so long as one did not get actually drunk; they did not know, or else ignored, the pathological effect of continued moderate drinking. In these days of working under high pressure, the fatigue experienced toward the end of the day was the cause of indulgence in alcohol. Many business men thought they must take some alcoholic beverage at night, either with or before their dinner. At one time the Massachusetts State Board of Health had analyzed twenty or thirty specimens of 'bitters' found in the market. Many of these were recommended as substitutes for alcohol, and as conducive to temperance, yet they were found to contain from forty to fifty per cent of alcohol. The fact was commonly overlooked that sherry wine was not really a wine in the dictionary sense of the term, but really a flavored spirit containing from thirty to forty-five per cent of alcohol. Ladies would often take sherry wine because it was called a wine, though they would shrink from taking any spirit."

The Hostetter formula is well known and is to be

found in druggists' books.

Standard Formulary, 10th Ed., 1899, Albert E. Ebert, A. Emil Hess, p. 225.

Argument.

The corporate existence of appellee was not shown. After the cause was argued and submitted, appellee filed a paper which it calls its charter (pp. 547 to 552). As the law of Pennsylvania was not shown by testimony, the presumption is that the law of that state is the same as the law of California. (*Brown* vs. *S. F. Gaslight Co.*, 58 Cal. 426; *Mortimer* vs. *Marder*, 93 Cal. 172.) No attempt was made to show any compliance with the *Civil Code* of California relating to corporations.

Over the objection and exception of appellant, appellee was permitted to file what it calls an "assignment" to itself from the estate of D. Hostetter, deceased (p. 543). This so-called assignment was filed March 25th, 1901, and the cause was submitted on March 20th, 1901 (page 534).

This so-called assignment purports to be executed between D. Herbert Hostetter, as administrator, and himself as president of the Hostetter Company. In other words, a trustee in one capacity transfers property to himself, as trustee, in another capacity, without any order of Court, without any authority of law, without any confirmation by the Court having jurisdiction of the estate of D. Hostetter, deceased, and without the

receipt of the consideration named in the so-called instrument. No sale of any personal property of an estate of a decedent is valid in California, until the sale has been reported to and confirmed by the Court having jurisdiction of the estate (*Cal. C. C. P.*, 1517, 1518, 1524, 1526).

This so-called assignment recites a nominal consideration of $90,000.00, payable $9,000.00 in cash and $81,000.00 on demand (p. 544), for which the administrator of the estate sold personal property, the actual value of which is fixed in the assignment at $141,322.82, and the good-will, which according to the testimony of Mr. Robb is worth $1,000,000.00. For $9,000.00 in cash and $81,000.00 on credit, an administrator of an estate sells practically to himself property worth $1,141,322.82. The audacity of such an action staggers a California lawyer. Even the proverbial Philadelphia lawyer would be amazed. Conceding that the good-will was absolutely worthless, notwithstanding Mr. Robb's statement in his alleged deposition, yet there is transferred by the bill of sale, personal property of the value of over $141,000.00. That the administrator of the estate realized that he had no right to make such a sale on credit without any security, without the order of any Court, and without the confirmation of any Court, we invite attention to the third paragraph of said so-called assignment (page 545), which shows that Mr. Hostetter, as administrator, was dealing with himself under the form and guise of a corporation. Said clause

reads as follows:

"3rd. To receive the payment of the said sum of " $81,000.00, and also to indemnify and save harmless " the said administrator from all loss, cost or expense " by him incured or suffered for, or by reason of the " making of this contract, and the execution of the " same, each and every one of the stockholders of the " said Hostetter Company, shall simultaneously with " the execution of this contract, assign and transfer to " the said administrator, each and every share of " stock owned by him or her, except one share which " shall be retained by each stockholder who is a mem- " ber of the board of directors. The said share shall " be held by said stockholder only for the purpose of " qualifying him or her to act as a member of the " board, and shall, on demand of said administrator, be " assigned and transferred to him for the same purpose " as the other stock."

The reason is apparent why Mr. Robb confined himself to the substance of this assignment when he gave his deposition (pages 50–51), but it further appears that M. L. Myers was a partner of D. Hostetter and no assignment is shown from Mr. Myers, but an attempt is made to show that Myers acquiesced in this proceeding. Thus Mr. Robb in his testimony (page 51) states that Myers was a nominal partner and that the assignment was attested to by the seal of the company, and the signature of the secretary, M. L. Myers, and that M. L. Myers was the same man who

was the nominal partner in the firm of Hostetter & Company, but when the copy of the assignment is produced the name of Mr. Myers does not appear as secretary or in any capacity (pages 51 and 545). The only parties thereto are "D. Herbert Hostetter administrator" and "The Hostetter Company, by D. Herbert Hostetter, Prest." In this connection we call the Court's attention to the case of *Blankman* vs. *Vallejo*, 15 Cal. 638. The opinion being by Judge Baldwin, Field, J., concurring:

> "We do not understand that the credulity of a Court must necessarily correspond with the vigor and positiveness with which a witness swears. A Court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statement, the inherent improbability of a statement may deny to it all claims to belief."

Mr. Robb's statement that the good-will of appellee was worth $1,000,000.00 should be absolutely disregarded, and the Court should find that complainant has not brought itself within the $2,000.00 statutory jurisdiction of the Circuit Court because if the good-will had been of any value, it is fair to assume that such valuation would have been fixed in the so-called assignment.

> "The good-will of a business is property, transferable like any other."
>
> *Cal. Civil Code*, Section 993.
>
> "One who sells the good-will of a business, thereby warrants that he will not endeavor to draw off any of the customers."
>
> *Cal. Civil Code*, 1776.

One partner has not the right to transfer or dispose of the good-will of the business. *Cal. Civil Code*, Section 2430. These are elementary principles, and we think it apparent that the appellee never acquired any title to the formula and good-will of Dr. J. Hostetter's Stomach Bitters. There was not even an attempt to prove that D. Hostetter ever acquired the title of Dr. J. Hostetter in and to said bitters. If D. Hostetter, through whose estate depends appellee's title, had any title, it would have been a simple matter for appellee to have shown that fact, and the omission of any such testimony is not only a failure of proof, but the Court must presume that no such testimony was in existence, or that appellee wilfully suppressed it, because it was adverse. *Cal. C. C. P.*, Section 1963, sub. 4, 5 and 6. There was also a predecessor known as Hostetter & Smith (p. 32). No title is deraigned from that firm (pp. 52, 43, 44).

We respectfully, but earnestly submit that the depositions taken in Pittsburg, should be suppressed, and we ask the Court to inspect the depositions in the cases Nos. 12,779, 12,780, 12,786, 12,787, 12,790, 12,793 and 12,794 with which this cause was argued and submitted in the Circuit Court (page 566). We think the taking of these depositions was unfair and improper. It needs no discussion that when a notice is served in San Francisco on the 2nd day of October, 1899, of taking a deposition in Pittsburg, Pennsylvania, on October 13th, 1899, and the deposition thus noticed for October 13, in the absence of the opposite party, is taken on the 9th day

of October, that such deposition must be suppressed. Again notice is given of the taking of the deposition of D. Herbert Hostetter. His deposition was not taken, but another witness was substituted for him; certainly that of itself should be sufficient to suppress the deposition. Again the taking of the second deposition, which, as we have before stated, is an exact duplicate of the first, was noticed for December 7th, 1899, and purports to have been taken on December 18th, 1899. It is true there is a recital (page 65) as follows: "And " now, to-wit: December 7th, 1899, the taking of depo- " sitions under said notice is postponed until December " 18th, 1899, at the same time and place, no one having " appeared on behalf of defendant and counsel for com- " plainant having so requested." But we submit that such an adjournment was improper (*Weeks on Depositions*, Sec. 322), and beyond the jurisdiction of the notary whom appellee selected to take the depositions, and that an inspection of the depositions shows that the witnesses did not in fact appear and give their depositions in December, for it is incredible that an oral deposition will be given in October, and that two months later the oral deposition of the same witness will be taken, in which the identical questions are asked, and the witness gives the identical answers, that the witness is interrupted by counsel in the same parts of his answers in giving his deposition in December as he was in giving his deposition in October. Even the same punctuation marks appear, showing

that the typewritist slavishly copied all the depositions from one model. Where was this model obtained? Appellee revels in litigation, and this model may have been used for years.

These depositions were taken under Sections 863, 864, and 865 of the U. S. Revised Statutes. These statutes have always been strictly construed. In *Bates on Federal Equity Procedure*, Volume 1, Section 404, it is said:

> "The authority to take depositions in the manner allowed by the statutes stated in the three sections next preceding, being in derogation of the rules of the common law, has always been construed strictly, and therefore it is necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible. The conditions under which a party is permitted, and a magistrate is authorized, to take depositions *de bene esse* under this act are: (1) that the witness lives a greater distance from the place of trial than one hundred miles; or (2) is bound on a voyage to sea; or (3) is about to go out of the United States; or (4) is about to go out of the district to a greater distance from the place of trial than one hundred miles; or (5) is ancient or very infirm. The magistrate is required to deliver to the court, together with the depositions so taken, a certificate of the reasons of their being taken, and of the notice, if any, given to the opposite party. In order to entitle the party to read such depositions when taken and certified in due form of law, he must show that at the time of the trial: (1) the witness is dead; or (2) gone out of the United States; or (3) gone to a greater distance than one hundred miles from the place where the court is sitting; or (4) that by reason of age, sick-

ness or bodily infirmity, or imprisonment, he is unable to travel and appear in court. The authority or jurisdiction conferred on the magistrate by this legislation is special, and confined within certain limits or conditions, and the facts calling for its exercise should appear upon the face of the instrument, and not be left to parol proof. The statute requires them to be certified by the magistrate. Where notice is required to be given to the opposite party, such notice should show on its face that the contingency happened which confers jurisdiction upon the magistrate, and gives a right to the party to have the deposition taken, so that the party on whom the notice is served may be able to judge whether it is necessary or proper for him to attend."

The authorities hold that the omission of the officer taking the deposition to certify that he reduced the testimony to writing himself, or that it was done by the witness himself, in his presence is fatal to the deposition, and that such facts will not be presumed, but must clearly appear from the certificate, and that the officer must certify that he reduced the deposition to writing in the presence of the witness.

Cook vs. *Burnley*, 11 Wall. 659;
U. S. vs. *Smith*, 4 Day 126;
Bell vs. *Morrison*, 1 Pet. 355;
Donahue vs. *Roberts*, 19 Fed. 863;
Marstin vs. *McRae*, Hempt. 688;
Rainer vs. *Haynes*, *Id.* 689;
Thorpe & Burton vs. *Simmons*, 2 Cranch. 195;
Ex parte Fisk, 113 U. S. 713.

The certificate of the notary in neither deposition conforms to the statute. The notice upon which the

deposition purports to have been taken on December 18, 1899, states that the testimony would be taken in shorthand, and afterwards reduced to writing upon a typewriting machine (page 94). The appellant declined to waive any of the provisions of the statute (page 95), but the certificate of the notary recites (page 90): "That said depositions were given in my presence and "taken stenographically, and thereafter signed by the "respective witnesses, and their said depositions are "now herewith returned."

It may be noted that the certificates do not show, nor was there any proof offered to the effect that the witnesses named in said depositions were not within one hundred miles of San Francisco at the time of the trial of the cause.

Under Section 354 of the *Penal Code* of California any person who refills a bottle having in any way connected with it the duly filed trade-mark or name of another for the purpose of disposing of the same to deceive or defraud, is guilty of a misdemeanor. The appellant's officers and salesmen are entitled to the presumption of innocence. The burden of proof was upon appellee.

As opposed to the testimony of the two men who were hired by appellee to obtain testimony, and in the giving of which they displayed careful drilling, we have the testimony of Mr. Paul Samuel, who sold the bitters to them. Mr. Samuel's testimony was given in such a manly, straightforward manner that counsel for ap-

pellee did not cross-examine him. After stating that he was the person who sold the bitters, he testified (pages 231 to 237):

" A. They came into the store. I was in the store " and walked up to them and asked them what they " wanted. They asked me if we sold any liquors. I " told them yes, we sold liquors and wine. 'Have you " any Tokay wine?' they asked. I told them yes, we " had Tokay wine. He asked me the price of the wine. " There was some wine being shipped that day, lying " on the sidewalk, marked 'Tokay', and I asked them " if they wanted to see a sample. They said yes. I " showed them a sample, which was satisfactory, and " told them the price would be $1.50 a gallon. They " said, 'All right, we will take some,' and I believe they " took a gallon or a half gallon. They then asked me " if we had any Hostetter's Bitters. I told them yes, " we have Hostetter's Bitters. They asked me how " much we charged for Hostetter's Bitters. I told them, " 'You wait a minute; I will go and see,' and walked in- " side, and looked up the cost, and quoted them $8.50 " for the bitters a case. They did not seem to be satis- " fied with that figure, and asked if it was a fact that " these bitters were sold for less sometimes; and so I " said, 'If Hostetter's Bitters are too high we have a " 'bitters that will suit you just as well as Hostetter's " 'Bitters.' He said, 'Yes, what do you charge for " them?' I said, 'We get $2.25 a gallon for them.' I " said, 'They are called H Bitters; we sell them for H

" Bitters.' So they said, 'Well, we will take a half gal-
" lon of those bitters.' I sent my order downstairs, and
" told the cellar-man to put up a half gallon of H Bit-
" ters. He brought them up. They asked me to tag
" the bitters. He tagged the bitters, and put 'H Bit-
" ters' on them, one-half gallon of H Bitters. They
" then asked me if I couldn't let them have an empty
" bottle. I asked what kind of a bottle. They said,
" 'We would like to have a bitters bottle.' I said, 'This
" 'is not the place to get bitters bottles. If you want an
" 'empty bottle the place to get it is in a junk shop; we
" 'have not got them.' I said, 'Sometimes a saloon fails
" 'on us, and we get a lot of goods, of bottles half empty
" 'and three-quarters empty, which we take out of the
" 'place and bring down here, and among those we
" 'might have a Hostetter's Bitters bottle;' and he says,
" 'We would like to have one of those bottles.' So I
" told the boy to bring a bitters bottle. The boy came
" down, and said he didn't have anything but a Lash's
" Bitters bottle. I said, 'A Lash's Bitters bottle
" 'will do; any kind of a bitters bottle will
" 'do.' He said, 'All right.' In the meantime the other
" boy upstairs had heard the conversation, and said,
" 'I know where there is a Hostetter's Bitters bottle,'
" and brings down a Hostetter's Bitters bottle. They
" paid me for the invoice. That is all. They left the
" store.

" Q. 12. Did you suggest to them that these H
" Bitters were Hostetter's Bitters, or genuine Hostet-

" ter's Bitters sold by the complainant or made by " them?

" A. No, sir; I told them that the bitters were bet- " ter than Hostetter's Bitters. They were a bitters " better than Hostetter's Bitters, and naturally tried to " sell my own bitters.

" Q. Did you suggest to them in any way that they " should get the Hostetter's Bitters bottle, and fill them " up with your bitters, and palm them off on the pub- " lic?

" A. No, sir; they asked me for a bottle, and I gave " them a bottle.

" Q. 14. Was there any other conversation at that " time besides what you have related?

" A. None whatever.

" Q. 15. If these witnesses said that you told them " to fill up the Hostetter's Bitters bottle with your H " bitters and to palm it off on the public, is that true or " false?

"A. They don't tell the truth.

" Q. 16. And you have related the entire conversa- " tion?

"A. Yes, sir; as it transpired.

" Q. 17. Did you say anything to them, anything " similar to this language: 'I will tell you fellows " 'something as you are new in the business. We " 'wouldn't handle Hostetter's Bitters if we couldn't " 'also sell them in bulk. The same company that puts " 'up the case goods also sells them in bulk?'

" A. That is entirely manufactured. I didn't say " anything of the kind.

" Q. 18. Or anything to that effect?

" A. No, sir.

" Q. 19. Do you recollect a second purchase, on or " about the 6th of April, 1899, and what took place?

" A. I remember the same two gentlemen coming " back into the store and they wanted some more wine. " I believe I asked them what they wanted. I believe " they wanted Tokay wine again; yes, sir, it was Tokay " wine again, and some other wine. I gave them the " price and they ordered it. Then they again asked " me if I wouldn't sell them one-half gallon of H Bit- " ters. I said certainly and gave an order for one-half " gallon of H Bitters.

" Q. 20. What conversation did you have at the " second interview?

" A. They asked for another bottle, another empty " bottle. I again asked the boy whether he could not " hunt up a bottle, and it took him some time to hunt " it up. He said that we had none, and there was a " bottle with lead in it, lead that we use in cleaning " bottles, and which was put in there so it would not be " lost, and asked me if he should empty that out, and " if this bottle would do. I told him any kind of bottle " would do. They said yes, any bottle would do. He " brought a bottle down and I handed it over to him.

" Q. 21. Was that a Hostetter's Bitters bottle, the " second bottle?

"A. I know it was a bitters bottle; a Lash's, or it "might have been a Huffland Bitters bottle with the "label on it. I don't recollect what kind of a bottle it "was. I didn't handle that bottle myself. I don't "recollect if there was a Hostetter's label on that bottle. "I knew it was a bitters bottle because they asked me "for a bitters bottle.

"Q. 22. There are a great many different kinds of "bitters?

"A. Yes, sir; a great many.

"Q. 23. Are there any different kinds of bitters "commencing with the letter "H" as an initial of the "name of the bitters?

"A. I know a great many, yes, sir.

"Q. 24. Tell me a few?

"A. There is Huffland; Dr. Hanley's; Highland "Bitters; Herb Bitters; Hoff Bitters; Hamburg Bitters. "Those are all bitters on the market.

"Q. 25. In addition to that there are a great many, "you may say, hundred of varieties of bitters?

"A. Exactly like patent medicines, of all kinds.

"Q. 29. Did you know of the defendant ever refill-"ing any bottle of Hostetter's Bitters?

"A. I know it was never done.

"Q. 30. Never filled any bottles?

"A. No, sir.

"Q. 31. Never put in empty Hostetter's Bitters "bottles—never put any bitters in them and called "them Hostetter's Bitters and sold them as such?

" A. Certainly not.

" Q. 32. Do you know whether there is an essence " of H Bitters sold in the market?

" A. Yes, sir; there is an essence of bitters sold.

" Q. 33. Been on sale a great many years?

" A. Yes, sir; long before I was born, I guess.

" Q. 34. Well known to the trade?

" A. Yes, sir; anybody could buy it.

" Q. 35. These H Bitters have been sold in this " market for a great many years?

" A. A great many years. We have been buying " it ever since we have been in business.

" Q. 36. They have been a subject of barter and " sale publicly?

" A. Yes, sir.

" Q. 37. There has never been any attempt by any- " body to disguise them or claim them to be other than " H. Bitters?

" A. We billed them as such.

" Q. 38. They are billed to you as such and you " bill them as such?

" A. Yes, sir.

" Q. 39. And the public generally has been selling " them as H Bitters for years?

" A. A great many years.

" Q. 40. When you say a great many years, you " mean long before you were in business?

" A. Before I was in business.

" Q. 41. Probably long before you were born?

" A. Yes, sir."

Complainant's Exhibits 1 and 6 substantiate Mr. Samuel's testimony. The first shows a sale of one-half of a gallon of H Bitters. The second simply a sale of one-half gallon of bitters (p. 588, 589).

There is absolutely no evidence to support the charge of fraud in the bill of complaint. There is no dispute that when appellee's paid employees went to appellant's place of business and asked for Hostetter's Bitters they were tendered appellee's compound, and were told that it cost $8.50 per case. Appellee's detectives so testified, and Mr. Robb testifies that $8.50 per case is the price at which they desire the bitters sold (pp. 37 and 38), and for which they allowed the jobber a discount or rebate of 10%. The sales by appellant of bitters are very small, and all the witnesses testify that for some purpose Mr. Samuel went into the office. Mr. Samuel says he went into the office to ascertain the price of Hostetter's Bitters. Appellee's witnesses state that after receiving the price of $8.50 per case, they stated that they thought it was "pretty high", and that then Mr. Samuel went into the office, and on his return suggested the buying of the bulk bitters. That Samuel should have been able to carry the price of $8.50 per case in his mind, and yet be compelled to go to the office to find out about the bulk bitters is remarkable. Certainly if he had been in the habit of selling the bulk bitters, there would not have been any necessity for him to go to the office to learn anything

about them.

It appears that appellee's detectives made reports to one of appellee's solicitors. The thirtieth of these reports was introduced in evidence by appellants as its exhibit No. 1 (pp. 590 to 593).

One of the disadvantges of the trial of equity cases is that the Court cannot see the witnesses, observe the manner in which they testify, and thereby to judge which witness is telling the truth, when the testimony is conflicting. So far as cold type may photograph an occurrence the production of appellant's Exhibit No. 1, thoroughly discredits Mr. Morrison's testimony. We particularly request the Court to read this testimony from page 142 to page 157.

The testimony as given by Mr. Samuel, and the language he used in testifying, shows that he did not make use of the language stated in appellant's Exhibit No. 1. Mr. Samuel's testimony shows that he is careful in the choice of words, is refined in manner and demeanor, and we submit appellant's Exhibit No. 1 without comment as an exhibit of the type of men appellee employed to discover testimony and unearth fraud.

S. P. Co. vs. *Robinson*, 132 Cal. 408.

Litigation seems to be one of appellee's methods of advertising. On its label it says: "The best evidence " of the merit of an article is the disposition to produce " counterfeits, and we regard it as the strongest testi-

" mony to the value of Hostetter's Celebrated Stomach " Bitters that attempts of that description have been " frequent." There is a remarkable similarity between the testimony produced in the various cases in this and in other jurisdictions, and it is apparent that appellee regards litigation as a good advertiser.

Hostetter Co. vs. *Brunn*, 107 Fed. 707.

A fair reading of the testimony shows that the appellee through its agents and detectives did all of the inviting. That these agents were not *bona fide* purchasers, but laid a careful trap for appellant. That Mr. Samuel with manly generosity tried to accommodate appellee's agents, and that the particular sales to appellee's agents were the only instances in the course of appellant's large business that any person had ever obtained from appellant an empty Hostetter's Bitters bottle. The evidence shows without contradiction that appellant did not even have any such empty bottles, and that the bottle obtained by appellee's agents had been used for the purpose of holding shot, which, as a matter of common information is used in cleaning bottles.

The conduct of the appellee amounted to an express license to the appellant to perform the acts of which it is accused. There is nothing from which the inference of similar acts at other times can be drawn! Appellee solicited the tort, if any was committed, and cannot now complain of it. The maxim "*Volenti non fit injuria*" applies. If any fraud was committed it was committed by appellee, and its agents, and not by the appellant.

Lawrence Mfg Co. vs. *Tennessee Mfg. Co.*, 31 Fed. 776; 138 U. S. 537.

In the case of *Hostetter* vs. *Fries*, 17 Fed. Rep. 620, the Court used the following language:

> "The complainants have neither the exclusive right to make bitters compounded after the formula of Dr. Hostetter nor the exclusive right to sell bitters by the name of Dr. Hostetter's Bitters. The preparation never had any name until it was offered to the public and christened. When a new article is made a name must be given to it, and this name becomes by common acceptation the appropriate descriptive term by which it is known, and therefore becomes public property. If this were not so, any person could acquire the exclusive right to a formula by giving a name to the compound produced, not only when the compound has not been patented, but where it might not be the subject of a patent. All who have the right to manufacture and sell the preparation have the right to designate and sell it by the name by which alone it is known, provided care is observed to sell the preparation as the manufacture of the seller and not the preparation made by another."

This is cited and followed in

Hostetter vs. *Van Vorst*, 62 Fed. Rep. 600.

See also

Holzapfel's Comp. Co. vs *Rahtzen's Comp. Co.*, U. S. Sup. Ct. Oct. Term, 1901.

Consequently such a name may be used generally by all persons to designate a certain kind of article.

Smith & Davis Mfg. Co. vs. *Smith*, 89 Fed. 486.

As a result the name Hostetter is not indicative of

the origin of the article manufactured by appellee or of any particular person or firm engaged in making bitters, but the term is now public property, and any person may use the name Hostetter and its abbreviations to indicate stomach bitters, provided he does not imitate the labels, etc., of any other maker of Hostetter Bitters, or by any other fraudulent means intentionally attempt to palm off his particular manufacture of Hostetter Bitters as the Hostetter Bitters made by any other maker.

Hostetter vs. *Fries*, 17 Fed. 620;
Hostetter vs. *Van Vorst*, 62 Fed. 600.

How can the use of the letter H infringe any right of appellee, if the use of the whole name, Doctor Hostetter's Stomach Bitters, be not an infringement?

Hostetter vs. *Fries*, 17 Fed. 620;
Hostetter vs. *Van Vorst*, 62 Fed. 600;
Lewanberg vs. *Pfefele*, 52 N. Y. S. 801;
McLean vs. *Fleming*, 96 U. S. 245–252.

Since it is clear that there is no infringement of a trade-mark in this case, in order to entitle it to an injunction the appellee must make out a case of unfair competition. To establish such a case appellee must prove actual fraud and an intent to deceive the public.

Lawrence Mfg. Co. vs. *Tennessee Co.*, 138 U. S. 537-549.
Hostetter Co. vs. *Comerford*, 97 Fed. 585;
Hostetter Co. vs. *Bower*, 74 Fed. 235.

And a wrong to appellee by selling fraudulently other goods as those of appellee. Actual fraud is the essence of the wrong.

Day vs. *Webster*, 49 N. Y. S. 314,

and must be actually shown.

Gaines & Co. vs. *Leslie*, 54 N. Y. S. 421;
Proctor Gamble Co. vs. *Globe Ref. Co.*, 92 Fed. 357;
Lawrence Mfg. Co. vs. *Tenn. Manf. Co.*, 138 U. S. 537–549.

This intent might be shown, as by example, by a colorable imitation of appellee's label; but where there is no question in a case of the infringement of a technical trade-mark or a colorable imitation of a label, then appellee must show fraud, and an actual deception, by palming off on the public the goods of appellant for those of appellee.

Brown on Trade-marks, Sec. 43;
26 Am. & Eng. Ency. of Law, 445.

Nothing less will suffice. It is not sufficient to prove that a dealer has been selling an imitation provided he sells it as an imitation and the vendee is not deceived.

> "A fraudulent intent is of the essence of unfair competition in trade, and where a manufacturer believes a dealer to be selling the goods of another as his, he should give such dealer notice, and an opportunity to desist before bringing suit."

Gorham Man. Co. vs. *Emery-Bird-Thayer*, 92 Fed. 774;
McLean vs. *Fleming*, 96 U. S. 245 at 254, 84 Fed. 215.

In this case the appellee has neither alleged nor proved any notice or warning of any kind to this appellant; consequently it is not entitled to an injunction or the above cases must be overruled in terms. The doctrines of these cases appeal to reason and to settled doctrines of equity.

It was held in *Hostetter* vs. *Bower*, 74 Fed. 235, that the testimony of witnesses hired to secure evidence was to be scrutinized with unusual caution,

Hostetter vs. *Comerford*, 97 Fed. 585;
Hostetter Co. vs. *Brunn*, 107 Fed. 707.

The case of *Gorham* vs. *Emery*, *etc.*, 92 Fed. 774, is very much in point. In that case plaintiff sent an agent to the store of defendant to obtain evidence of an infringement and induced the clerks in the store to falsely mark upon the sales bills delivered so as to indicate that the articles sold was of the Gorham Company's manufacture, though the agents had been distinctly told by the clerk that it was not. The Court said:

> "Nobody was deceived or defrauded into the sale claimed to have been made to the detective sent to the defendant's store to get evidence. They knew exactly what they were getting; the conduct of complainant's agent who by deceit and duplicity induced the saleswoman to mark on the sale tag the word 'Gorham' shows that his intent and purpose were to procure a wrongful act to make it the basis of a lawsuit. A man who procures another to slander him cannot make it the basis of an action for damages. This is based upon a fundamental principle of the law. No person has the right to en-

> trap another by false and fraudulent appearances in order to induce an act on which to base a claim for damages in a court of justice. How much more should the rule apply in a court of equity, which in its search after justice looks into the very heart to define the motive?"

In this case the witnesses for appellee were not deceived and did not intend to buy Hostetter's Bitters. There is no evidence in this case of any intention on the part of appellant or any of its agents to impose upon any one or deceive any one. Nor is there any evidence except the guess-work of these two hired detectives that anybody would be fooled or deceived or misled under the circumstances under which these purchases were made, into believing or thinking that they were buying the bitters made by appellee, when they refused to buy them because they were too expensive. The essential element of unfair competition is entirely lacking in this case.

The evidence shows that Hostetter's Bitters are never sold in bulk, but always in bottles, with label and glass blown, and the evidence conclusively shows that all of the Bitters sold by appellant were sold in bulk in demijohns, contained in demijohns, nothing on the demijohns or anything else to show that they were or pretended to be anything manufactured by appellee. Appellant "discharges his full legal duty when he so " dresses his product that one who seeks to know " whose manufacture it is can readily learn by reasona- " ble examination" and that it was not the manufacture

of this appellee.

Centaur Co. vs. *Gardiner*, 97 Fed. 785;
Holzapfel's Comp. Co. vs. *Rahtjen's Comp. Co.* (*supra*).

There was absolutely no deception of any kind, nature or description in this case. Appellee failed to give any notice or warning that its rights were being infringed upon, and therefore it is not entitled to any relief under the authority of *Gorham Manufacturing Co.* vs. *Emery etc.*, 92 Fed. 774, and *McLean* vs. *Fleming*, 96 U. S. 254.

The evidence as to the value of the bitters is not the best evidence. The best evidence, of course, was the formula, and the legal presumption is that the best evidence, if produced, would have been unfavorable to the appellee.

Cal. C. C. P., Sec. 1963, Sub. 5;
Laird vs. *Wilder*, 9 Bush (Ky.) 131, 134–137;
s. c. 15 Am. Rep. 707, 710, 711.

In the last case it was said (page 711):

> " In addition to all these facts the utter failure of the appellant to prove the ingredients of this questionable drug of his is a significant and cogent circumstance against him."

It is no excuse that the formula is a trade secret, as a matter of fact the formula is well known, and is to be found in all druggists' books.

Standard Formulary, 10th ed., 1899, Albert E. Ebert, A. Emil Hess, p. 225.

But if it were a trade secret still this would be no excuse.

Hostetter Co. vs. *Comerford*, 97 Fed. 585, 586, where the Court said:

> " It is the complainant's misfortune in a case of this character that the formula under which it manufactures is a trade secret, and is, therefore, never produced. But when fraud is charged the Court cannot close its eyes to the fact that the complainant has in its possession proof which will remove all doubt, and withholds it for its own advantage."

We gave appellee ample opportunity of disclosing the formula by demanding it from the witness Robb on cross interrogatories

We respectfully refer the Court to the label, almanac and advertisements introduced in evidence to show the extravagant, inconsistent and incredible claims of the appellee. Even its own witness Dr. D'Homerque said that these were exaggerations.

In *Krauss* vs. *Peebles*, 58 Fed. 585, a distiller mixed 35% of other whiskey, bought with the purpose with his own brand, and sold it under his own label as his own product. Recovery against an infringer was denied on account of the misrepresentation. It was admitted that the purchased article was as good as he manufactured, but that was held not to justify the fraud on the public.

If this is a fraud *a fortiori*, it is a fraud for one to mix with an alleged medicine 43% of a liquor which

the medicine is not represented to contain, and which is positively injurious to many people and in many instances.

Holzapfel's Comp. Co. vs. *Rahtjen's Comp. Co.*, (*supra*)
Manhattan Medicine Co. vs. *Wood*, 108 U. S. 218;
Hilson vs. *Foster*, 80 Fed. 896;
American Cereal Co. vs. *Pettijohn Cereal Co.*, 72 Fed. 903;
Coleman vs. *Dannenberg Co.*, 30 S. E. (Ga.) 869;
Chapman vs. *State*, 27 S. E. (Ga.) 789;
Mitchell vs. *Commonwealth*, 51 S. W. (Ky.) 17;
Brown Chemical Co. vs. *Meyer*, 139 U. S. 540;
Schmidt vs. *Brieg*, 100 Cal. 673;
Burton vs. *Stratton*, 12 Fed. 689;
Ginter vs. *Kinney Tobacco Co.*, 12 Fed. 783;
Leather Cloth Co. vs. *American Leather Cloth Co.*, 4 DeG. J. & S. 137;
s. c. on Appeal, 11 H. L. Cas. 523;
Clotworthy vs. *Schepp*, 42 Fed. 62;
Alden vs. *Gross*, 25 Mo. App. 128;
Connell vs. *Reed*, 128 Mass. 477;
Siegert vs. *Abbott*, 61 Md. 276;
Seabury vs. *Grosvenor*, 14 Blatchf. 262;
Fetridge vs. *Wells*, 13 How. Pr. 385;
Phalon vs. *Wright*, 5 Phila. 504;
Prince Manfg. Co. vs. *Prince M. P. Co.*, 125 N. Y. 24.

In *Holzapfel's Comp. Co.* vs. *Rahtjen's Amer. Comp. Co.*, *supra*, opinion filed Oct. 2nd, 1901, the U. S. Supreme Court says:

" We are of opinion that no valid trade-mark

was proved on the part of the Rahtjens, in connection with the paint sent by them from Germany to their agents in the United States prior to 1873, when they procured a patent in England for their composition. It appears from the record that from 1870 to 1879, or late in 1878, the paint was manufactured in Germany by Rahtjen, and sent to the United States in casks or packages marked 'Rahtjen's Patent Composition Paint'.

" Prior to November, 1873, the article was not patented anywhere and a description of it as a patented article had no basis in fact, and was a false statement tending to deceive a purchaser of the article. No right to a trade-mark which includes the word 'patent', and which described the article as 'patented', can arise when there is and has been no patent; nor is the claim a valid one for the other words used, where it is based upon their use in connection with that word. A symbol or label claimed as a trade-mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained."

The Supreme Court of the United States says, in *Canal Company* vs. *Clark*, 13 Wall. 311:

"Nor can a general name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics be employed as a trade-mark, and the exclusive use of it entitled to legal protection."

To the same effect are the following cases:

Brown vs. *Meyer*, 139 U. S. 540;
Caswell vs. *Davis*, 58 N. Y. 223;
Manufacturing Co. vs. *Trainor*, 101 U. S. 54;
Gillman vs. *Hunnewell*, 122 Mass. 139;
Stokes vs. *Landgraff*, 17 Barb. 608;

Corwin vs. *Daly*, 7 Bosw. 222:
Amoskeag vs. *Spear*, 2 Sandf. 599.

As illustrating the rule and showing the extent to which it has been carried, it will be interesting to note the subjoined list of words which have been held to be descriptive:

"Iron bitters,"
Brown vs. *Meyer*, 139 U. S. 540.

"Sarsaparilla and iron,"
Schmidt vs. *Brieg*, 100 Cal. 673.

"Aromatic Schneidam Schnaps,"
Burke vs. *Cassin*, 45 Cal. 467.

"Desiccated codfish,"
Town vs. *Stetson*, 5 Abb. Pr. N. S. 218.

"Antiquarian book store,"
Choynski vs. *Cohen*, 39 Cal. 501.

"Ferro-phosphorated elixir of calisaya bark,"
Caswell vs. *Davis*, 58 N. Y. 223.

"Cherry pectoral,"
Ayer vs. *Rushton*, Codd. Dig. 229.

"Tasteless drugs,"
In re Dick & Co., 9 O. G. 538.

"Burgess' essence of anchovies,"
Burgess vs. *Burgess*, 3 De G. M. & G. 896.

"Balm of a thousand flowers,"
Fetridge vs. *Wells*, 4 Abb. Pr. 144.

"Club-house gin,"
Corwin vs. *Daly*, 7 Bos. 222.

"Extract of night-blooming cereus,"
Phalon vs. *Wright*, 5 Phila. 464.

"Liebig's Extract of meat,"
Meat Co. vs. *Hanburg*, 17 L. T. N. S. 298.

"Bees-wax oil,"
"*In re Hathaway*, Com. Dec. '71, p. 97.

"Invisible face powder,"
In re Palmer, Com. Dec. '71, p. 289.

"Razor steel,"
In re Roberts, Com. Dec. '71, p. 100.

"Mammoth wardrobe,"
Gray vs. *Koch*, 2 Mich. N. P. 119.

"Parson's Purgative pills,"
In re Johnson Co., 2 O. G. 315.

"Crack-proof India rubber,
In re Goodyear Rubber Co., 11 O. G. 1062.

"Croup Tincture,"
In re Roach, 10 O. G. 333.

"Cough remedy,"
Gillman vs. *Hunnewell*, 123 Mass. 139.

"Iron stone water pipes,"
In re Rader & Co., 13 O. G. 596.

"Nourishing stout,"
Raggett vs. *Findlater*, L. R. 17 Eq. 29.

"Angostura bitters,"
Siegert vs. *Findlater*, 7 Ch. Div. 801.

"Julienne soup,"
Godillot vs. *Hazard*, 49 How. Pr. 5.

"Parafin oil,"
Young vs. *Macrae*, 9 Jur. N. S. 322.

"Lackawanna coal,"
Canal Co. vs. *Clark*, 13 Wall. 311.

"American sardines,"
In re Sardine Co., 2 O. G. 495.

"Straight cut,"
Ginter vs. *Kinney T. Co.*, 12 Fed. 782

"Homeopathic Specifics,"
Medicine Co. vs. *Wenzm*, 14 Fed. 250.

"Cramp cure,"
L. H. Harris vs. *Stucky*, 46 Fed. 624.

It is beneath the dignity of a Court of equity to protect a quack medicine.

This principle was first enunciated, and a quack medicine defined, as one, the ingredients of which are not disclosed to the public, by Judge Kane, Circuit Judge of the Eastern District of Pennsylvania, in *Fowle* vs. *Spear*, Fed. Cases 4996; s. c. Cox's Am. Trade-mark Cases, page 67. This case was followed in *Heath* vs. *Wright*, Fed. Cases 6310; s. c. Cox's Am. Trade-mark Cases, page 154.

See also *26 A. & E. Ency. of Law*, 1st Ed., pp. 456, 458.

These cases were both cited without dissent by Hopkins in his work on Unfair Trade, Sec. 27.

See also *Smith* vs. *Woodruff*, 46 Barb. 438, 440, where the Court said:

> "It is a defense that ought to be suggested by the Court in some cases, and probably would be in all cases where the imposition is flagrant. For instance, where a quack compounds noxious and dangerous drugs, hurtful to the human constitution, and advertises them as a safe and sure remedy for disease; or when some charlatan avails himself of the prejudice, superstition, or ignorance of some portion of the public, to palm off a worthless article, even when not injurious, the case falls beneath the dignity of a Court of justice to lend its aid for the redress of such a party, who has been interfered with by the imitations of another quack or charlatan."

Wolfe vs. *Burke*, 56 N. Y. 115, 122, 123, where the Court refused to protect Schiedam Schnapps advertised as a medicine, upon the ground that it was merely an alcoholic stimulant.

The foregoing cases are cited and commended by Judge Shiras with his customary vigor in the case of *Kohler Manufacturing Co.* vs. *Beeshore*, 59 Fed. 572, in which he said:

> "It has been more than once held in this circuit that Courts of equity will not intervene by injunction in disputes between the owners of quack medicines, meaning thereby remedies or specifics

> whose composition is kept secret, and which are sold to be used by the purchaser without the advice of regular or licensed physicians."

Of course, the foregoing does not prevent the owner of a quack medicine from suing at law for damages upon a violation of his trade-mark, but it is not for a Court of equity where openness, fairness, ingenuousness plays so important a part to protect a compound whose ingredients are not disclosed, and which may be a menace to the public. Just after the time Judge Shiras sounded his warning to quacks, the New York Supreme Court met the question squarely in *Siegert* vs. *Abbott*, 25 N. Y. S. 590, 597, reversing the lower Court which had protected Angostura Bitters, a compound in the Hostetter Bitters category, but still older and more widely known. The Court said that if the bitters had no medicinal properties, and were only useful for flavoring wines and liquors, they should be so advertised and sold, and not as having medicinal merits, and added:

> "We do not think Courts of equity should be swift or vigilant to protect the manufacturer of a compound advertised and sold as a valuable medicine, which is not shown to contain a single medical ingredient, or to possess a single merit claimed for it, as against another manufacturer, producing and selling a like compound."

Among the reasons why equity should not protect a quack medicine are the following:

(1) Secrecy and concealment are insignia of fraud. If the formula is known and valuable the medicine may be patented, and the patent will afford all legitimate

protection. The formula may then be disclosed on the label and the medicine is then taken out of the quack category. The opposition of the medical fraternity to this method of imposing upon the public is causing all the better classes of proprietary remedies to be put upon the market with the formula printed on the label. The seller relies upon his name to sell the goods.

(2) Unless the Court declines to entertain any quack medicine cases, it is called upon, when the defense of fraud upon the public is raised, to go through a mass of secondary evidence such as is brought to the Court in this case. But if the formula were disclosed the Court and the public could tell instantly the value of the remedy.

(3) Unless the Court absolutely declines to consider these cases, equity, which is supposed to protect human rights, may work great damage to the public by unwittingly protecting a compound of the most vicious character.

(4) If equity does not discountenance such cases it tacitly invites all quacks to put up any noxious compound, and protects it until such time as some public benefactor discloses to the Court and the public its vicious nature, as we have been compelled to do in this case.

(5) There are laws against the practice of medicine without a license and yet the proprietor of a quack medicine, without disclosing the nature of his remedy,

prescribes it for a vast number of human ailments, and is paid therefor. A court of equity should not foster such a practice, which is essentially a violation of law.

(6) No man has a right to exploit human life. This is exactly what a quack does, putting up one remedy, prescribing it indiscriminately for a vast number of ailments without regard to symptoms, complications, or constitutional or organic weaknesses. It is in the nature of things impossible that what is good for one person under certain circumstances, will be good for another person under the same circumstances. Physiological differences are too great; and yet a multitude of quacks are constantly playing fast and loose with human life, gulling the credulous, imposing upon the weak and aggravating instead of ameliorating suffering. We respectfully submit that such people have no right to ask a court of equity to aid them in their nefarious practices.

As a special defense appellant contended and introduced a large amount of testimony for the purpose of showing that appellee's compound is nothing more than an alcoholic stimulant, or as it was phrased by Dr. Williamson, "an elaborate cocktail containing more ingred-" ients than the drink known by that name" (p. 340)

With reference to this defense, the distinguished Circuit Judge said in his opinion:

> "And with regard to this second contention, that the complainant preparation is of no value whatever, save as an intoxicating beverage, this state-

> ment appears to come at rather a late hour, considering the number of years it has been before the public and the numerous law suits in which it has been involved, wherein such a proposition would undoubtedly have arisen and been determined, if meriting attention."

We respectfully differ on this point with the able jurist, with whose opinions it has generally been our pleasure to thoroughly concur. We note a constant tendency in the Bar to mould litigation so as to bring it within the four corners of some adjudicated case. The constant multiplication of law books has a tendency to encourage the Bar to rely on precedent, and to disregard principle. We think such tendency should be discouraged, and the fact that a proposition has not been decided in some prior case should not foreclose discussion, nor lead to the conclusion that it is not meritorious.

Appellant is a whiskey dealer, and makes no pretense of being a believer in prohibition, or in total abstinence from the use of alcoholic stimulants. There are many persons, however, who believe in temperance as they believe in their soul's salvation, and it is a fraud upon such persons to give them alcohol and call it medicine. There are many persons with weak wills and strong appetites to whom an alcoholic beverage in the seductive form of an advertised medicine is a constant menace. It is the same menace to the reformed drunkard, who is trying to lead an abstemious life. It is also well known that a highly flavored alcoholic

stimulant such as Hostetter's Bitters is more likely to produce alcoholism than the ordinary stimulant.

Thompson on Practical Dietetics, p. 323;
Dr. Williamson's testimony (p. 328, 338).

Medicinally by a wineglass is meant four fluid ounces (p. 295) but the ordinary wineglass holds about twelve ounces (p. 296). The ordinary consumer uses the ordinary wineglass. Appellee prescribes its bitters from the directions on its labels as follows:

" One wine-glassful three times a day, before meals, " will be a swift and certain cure for Dyspepsia, Liver " Complaint, and every species of Indigestion — an " unfailing remedy for Intermittent Fever, Fever and " Ague, and all kinds of periodical disorders—a means " of immediate relief in Flux, Colics, and Choleraic " maladies—a cure for Costiveness—a mild and safe " invigorant and corroborant for delicate females—a " good, anti-bilious, alterative and tonic preparation for " ordinary family purposes—a powerful recuperant " after the frame has been reduced and attenuated by " sickness—an excellent appetizer as well as strengthener of the digestive forces—a depurative of the blood " and other fluids, desirable alike as a corrective and " mild cathartic, and an agreeable and wholesome stimulant."

Appellee's bitters were analyzed by Mr. Falkenau, a chemist of thirty-five years' experience in San Francisco, and found to contain 43% of absolute alcohol (p. 255). Whiskey contains from 40 to 50% of absolute

alcohol (p. 269). Professor Price, who was selected by the Court for the purpose of analyzing appellee's bitters found they contained alcohol by weight 36.56%, alcohol by volume 43.56% (p. 542).

J. M. Curtis & Son, of San Francisco, analyzed appellee's bitters with the following result (p. 528):

" J. M. Curtis. Marvin Curtis.

J. M. Curtis & Son,

Laboratory of Organic Chemistry,

129 California street, Telephone Green 91.

No. 4360.

San Francisco, Nov. 10th, 1899.

Analysis of sample of Hostetter's Bitters purchased by us, October 23, 1899, from Mack & Co.

Specific Gravity at 60 Deg. Fah.....	.96135
Alcohol by volume (including volatile oil of wormwood).....	43.110 per cent.
Dry Extract	4.490 per cent.

The Dry Extract contains:

Invert sugar.....	.590 per cent.
Cane sugar....	3.420 per cent.
Ash.	.019 per cent.
Free acid (calculated as malic)	.009 per cent.
Albuminoids	.044 per cent.
Ether Extract (fat).....	.008 per cent.
Alcohol extract, containing the bitter principle.....	.260 per cent.

Resin, coloring matter, etc. of wormwood, undetermined (suspended matter, cellulose, gums, etc.) by difference.....	.140 per cent.
Total Extract	4.490 per cent.

J. M. Curtis & Son. "

An alcoholic stimulant is contra indicated in most of the diseases for which Hostetter Bitters are prescribed by appellee in its almanacs, in its printed advertisements (p. 594, 595, 596, 597), and in its labels. Every standard medical work on the subject contradicts the claims and pretenses of appellee.

We have the testimony of San Francisco doctors to the effect that a wineglass full of liquor 43% of which is absolute alcohol, taken three times a day before meals is liable to produce cirrhosis of the liver, and fatty degeneration of the kidneys (p. 294). That indigestion and dyspepsia, as the terms are popularly used, result from overeating, and from the overdrinking of some stimulant (p. 297). That in all liver troubles alcohol is strictly prohibited (p. 301), that in cases of rheumatism, gout, kidney and bladder troubles alcohol should not be prescribed. That appellee's compound is an alcoholic stimulant (p. 307) which has a tendency to produce a false appetite, and to cause overeating and overdrinking. That absinthe and wormwood are the same thing, and taken in quantities have a tendency to insanity.

Lloyd M. Robbins, an attorney at law, twenty-five years of age, drank two and one-half prescriptions of appellee's bitters. That is, at five intervals of fifteen minutes, he took one-half the quantity prescribed by appellee on its labels. As a result he fell asleep, and suffered from headache two days thereafter (pp. 361, 362). From his own experience, and from what others had told him, he testified that appellee's bitters are more intoxicating than the same amount of whiskey (p. 367).

The testimony shows that appellee's bitters are particularly dangerous to women (p. 342).

Dr. Williamson testified (p. 348) that bitters are preferably given without alcohol.

Appellee made an unsuccessul attempt to meet this evidence, which testimony it took in the east, without any showing that expert testimony could not be produced in California. It produced an analysis of Mr. Wuth (p. 399), showing the quantity of alcohol to be 35.15%, but the analysis, though purporting to be made by an expert, does not show whether he refers to weight or volume, and he evidently referred to weight from the analysis of Professor Price, who was named by the Circuit Judge for that purpose. We call the Court's attention to a conflict between the opinion of the Circuit Court in the case at bar, and the opinions of other circuits as shown by the cases reported in 10 Fed. 838; 17 Fed. 621; 62 Fed. 600; 74 Fed. 235 and 97 Fed. 585, and assume that, if requested, this Court

will certify the questions herein to the Supreme Court.

In conclusion we call the Court's attention to the fact that appellee is self-convicted of selling an alcoholic stimulant. It admits that the bitters sold by appellant are so much like its own in color, taste and smell that only an expert may distinguish them. Of course, the ingredients make this similarity and the two are practically identical. The bitters bought from appellant are admittedly an alcoholic stimulant. Therefore the appellee's bitters must be an alcoholic stimulant. In addition the appellee is suing a liquor house for unfair competition. If the appellee was selling its bitters solely as a medicine, the acts charged against the appellant would not amount to competition. People do not buy medicine at liquor stores, put up in one-half gallon demijohns. It is notorious that appellee's alleged medicine is sold as a substitute for liquor in prohibition districts.

We respectfully submit that the decree of the Circuit Court should be reversed, and the bill dismissed.

R. H. COUNTRYMAN,
Solicitor for Appellant.